



# COUGHLIN DUFFY LLP

CASE ALERT, NO. 23

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## Settlement Reached Without Participation and Consent of Insurer Defending Under a Reservation of Rights Breached Policy's "Cooperation Clause"

On July 13, 2007, the New Jersey Appellate Division held that an insurer was not responsible for a settlement agreement negotiated between its insured and injured third-parties when the insurer did not participate in or consent to the settlement. New Jersey Eye Ctr. v. Princeton Ins. Co., \_\_\_ N.J. Super. \_\_\_, 2007 N.J. Super. LEXIS 250 (App. Div. 2007). This decision is significant as it enforced the "cooperation clause" of the policy and deemed the insured's conduct to be a "complete derogation" of its obligations under the policy.

Dr. Dello Russo, an ophthalmologist, performed numerous Lasik eye surgeries at the New Jersey Eye Center, P.A. ("the Eye Center"), of which he was the principal. Some of his patients filed lawsuits against Dello Russo and the Eye Center, alleging injuries resulting from medical malpractice during the Lasik surgeries. The Eye Center sought insurance coverage from its malpractice insurer, Princeton Insurance Company ("Princeton"), which agreed to defend under a reservation of rights. Dello Russo had personal malpractice insurance from a different carrier.

Without the participation or consent by Princeton, Dello Russo's personal attorney, counsel for Dello Russo's malpractice carrier and counsel for the various plaintiffs reached a settlement. Dello Russo and the Eye Center agreed to assign to plaintiffs, pursuant to Griggs v. Bertram, 88 N.J. 347 (1982), all of their rights under Princeton's policy and agreed to waive their rights to contest liability and proximate

cause. Moreover, they agreed to participate in binding, non-appealable arbitrations of plaintiff's damage claims, at which the only witnesses would be the plaintiffs.

The trial court, after rejecting Princeton's objections that the settlement was a result of collusion and that the awards to the various plaintiffs were not fair and reasonable, entered judgment against Princeton for the amounts awarded in arbitration. The Appellate Division reversed, concluding that Dello Russo, as principal of the Eye Center, failed to cooperate with Princeton by entering into a settlement agreement without Princeton's consent or participation. The court held that such cooperation was required under the Princeton policy and, as such, the Eye Center was not entitled to coverage, citing its opinion in Pasha v. Rosemount Memorial Park, Inc., 344 N.J. Super. 350 (App. Div. 2001), certif. denied, 171 N.J. 42 (2002).

A frequent stratagem of plaintiff coverage claimants is to settle underlying litigation without notice to or participation by their insurers. This recent decision is significant because it shows that in New Jersey insurers can challenge such settlements.

For additional information, please contact William Metcalf or Michael Carrer.

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